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Academic Tenure: Its Historical and Legal Meanings in the United States and its Relationship to the Compensation of Medical School Faculty Members

Lawrence White

ACADEMIC TENURE: ITS HISTORICAL AND LEGAL MEANINGS IN THE UNITED STATES AND ITS RELATIONSHIP TO THE COMPENSATION OF MEDICAL SCHOOL FACULTY MEMBERS

LAWRENCE WHITE*

I. INTRODUCTION

For the last ten years, America's medical schools have endured an economic earthquake of almost unimaginable proportions. In 1992, Georgetown University Law Professor Gregory Bloche identified and described what he called "the developing financial squeeze on academic medical centers," attributing it to stinginess in federal health-care reimbursement policy, the then-nascent (now largely realized) revolution in third-party payment for clinical care, and the resulting reduction in cross-subsidies that supported more than forty years of growth in teaching and research at American medical schools after the Second World War.[1] Shortly

* Program Officer, Pew Charitable Trusts, Philadelphia, Pennsylvania, and formerly University Counsel, Georgetown University, Washington, D.C. B.A., Harvard University (1971); J.D., University of Pennsylvania (1975). The author wishes to thank the reference staffs at the Law School and Health Sciences Center Libraries at the University of New Mexico for generous research assistance provided during the preparation of this article. He also wishes to thank Professor Jesse Goldner of the Saint Louis University School of Law and the staff of the SAINT LOUIS UNIVERSITY LAW JOURNAL for their editorial assistance and encouragement. The views expressed in this article belong to the author, and should not be attributed to the organizations at which he is currently or was formerly employed.

1. M. Gregg Bloche, *Corporate Takeover of Teaching Hospitals*, 65 SO. CAL. L. REV. 1035, 1046-61 (1992). For a perceptive treatment of the causes underlying the current financial difficulties confronting academic medical centers, see John. K. Iglehart, *Health Policy Report: Rapid Changes for Academic Medical Centers (Second of Two Parts)*, 332 N. ENG. J. MED. 407 (1995). Mr. Iglehardt notes, for example, that:

> Despite their success, academic medical centers have surprisingly fragile economic foundations. Their many missions are financed through a complex web of cross-subsidies, because as a rule most functions – such as undergraduate and graduate medical education, biomedical research, and the treatment of severe or unusual diseases – do not pay for themselves. . . . As the system evolves to resemble a competitive marketplace more closely, . . . *the ability of academic medical centers to continue financing their activities through cross-subsidies is problematic in the extreme.* The reason is that payers – employers, managed-care plans, and government, as well as patients – are placing more emphasis on reducing the rate of increase in medical expenditures.

after Professor Bloche's article appeared, his warning of an impending financial crisis in academic medicine became suddenly and palpably real. By 1996, according to the Association of American Medical Colleges ("AAMC"), twenty percent of the nation's teaching hospitals were losing money, some at prodigious rates.[2] As the decade drew to an end, at least two prominent academic medical centers reported operating losses of more than $75 *million* annually.[3] Another academic medical center declared bankruptcy in 1998, threatening the closure of major urban teaching hospitals and the loss of thousands of health care jobs.[4]

In an effort to cope with economic hard times, academic medical centers are struggling to become more entrepreneurial. They are forging alliances with hospital systems perceived to be more adept at providing (and marketing)

Id. at 407 (emphasis added) (footnotes omitted). *See also* David Blumenthal & Gregg S. Meyer, *The Future of the Academic Medical Center Under Health Care Reform*, 329 N. ENG. J. MED. 1812 (1993).

2. Martin Van Der Werf, *Changing Economics of Health Care Are Devastating Academic Medical Centers*, CHRON. HIGHER EDUC., May 21, 1999, at A38, A38-A39.

3. *Id*. at A38 (stating that the University of Pennsylvania Health Services System lost nearly $90 million last year, while Georgetown University Medical Center has lost almost $120 million in the past two years).

4. *See Big Pennsylvania Health System to File Chapter 11*, WALL ST. J., July 21, 1998, at B7. The AAMC predicts that in the next three years the number of academic medical centers with annual operating deficits will approach fifty percent of the total. One recently enacted federal statute – the Balanced Budget Act of 1997, which reduces Medicare payments to hospitals – will result in the loss of almost $15 *billion* in Medicare reimbursements to the nation's teaching hospitals in the five-year period between 1997 and 2002. *See* Van Der Werf, *supra* note 2, at A38.

No organization has done a more diligent job of chronicling the worsening economic plight of academic medicine or the reasons for it than the AAMC, the professional assembly of American and Canadian academic medical centers. Through its official monthly journal ACADEMIC MEDICINE, the AAMC regularly commissions and publishes thoughtful articles on the effects managed care and other market forces are having on medical school governance, the financial management of academic medical centers, faculty compensation policies, and faculty tenure policies. *See, e.g.*, Robert F. Jones & Jennifer S. Gold, *AAMC Paper–Faculty Appointment and Tenure Policies in Medical Schools: A 1997 Status Report*, 73 ACAD. MED. 211 (1998); Paul F. Griner & David Blumenthal, *AAMC Paper–Reforming the Structure and Management of Academic Medical Centers: Case Studies of Ten Institutions*, 73 ACAD. MED. 818 (1998).

In 1997, the AAMC, supported by a grant from the Robert Wood Johnson Foundation, created the "Forum on the Future of Academic Medicine" ("Forum") providing focused assistance to university and medical school leaders in coping with market-driven changes in clinical care. John Iglehart's reports on the Forum's deliberations are published in ACADEMIC MEDICINE and, as the names of the papers suggest, usefully summarize causes and effects. *Session I–Setting the Stage*, 72 ACAD. MED. 595 (1997); *Session II–Finances and Culture*, 72 ACAD. MED. 754 (1997); *Session III–Getting from Here to There*, 73 ACAD. MED. 146 (1998); *Session IV–The Realities of the Health Care Environment*, 73 ACAD. MED. 956 (1998); *Session V–Implications of Basic and Applied Research for AMCs*, 73 ACAD. MED. 1241 (1998).

clinical services without losing money.[5] Not surprisingly, "[t]he rise of cost consciousness," to use Professor Bloche's felicitous phrase,[6] has surfaced tensions between medical school faculty members and a new generation of bottom-line-oriented clinical administrators. Faculty fear that academic medical centers will retreat from traditional academic values, while administrators decry, in tones of increasing urgency, the perceived irresponsibility of long-term commitments to teaching and research in an era of unprecedented financial volatility.[7]

The tension is visibly manifested in fundamental disputes over the meaning of faculty tenure in contemporary academic medicine. In 1995, AAMC President Dr. Jordan Cohen warned of the cultural disharmony between medical school administrators and tenured medical school faculty members:

> The existence of tenure in medical schools represents a linkage to the broader academic culture of the university, with its traditional devotion to a free exchange of ideas without threat of economic penalty. Yet, medical schools, because of their increased involvement in the real world of health care delivery, are also linked to the corporate culture, with its brutal devotion to productivity without guarantees of economic security. The clash of these cultures is reaching deafening proportions and will challenge the most adroit academic administrators. If medical schools are to succeed, they must avoid the Scylla of an ivory-tower disregard of new competitive realities and the Charybdis of a corporate sellout of academic values.[8]

In the mid-1990s, academic medical centers, with varying degrees of buy-in from their faculties, began wide-ranging examinations of their faculty compensation policies. The AAMC convened two well-attended conferences on faculty tenure and compensation issues, including one in 1997 with the provocative title *Legal Issues in Faculty Tenure and Compensation*.[9] By that

5. *See* Van Der Werf, *supra* note 2, at A39 (noting Tenet Health Care Corporation's recent purchase of St. Louis University Medical Center and Columbia/HCA Healthcare Corporation's eighty percent acquisition of Tulane Hospital).

6. Bloche, *supra* note 1, at 1052.

7. *See* Michael K. Magill et al., *Cultures in Conflict: A Challenge to Faculty of Academic Health Centers*, 73 ACAD. MED. 871, 872-73 (1998).

8. Jordan J. Cohen M.D., *Academic Medicine's Tenuous Hold on Tenure*, 70 ACAD. MED. 294 (1995).

9. The two conferences were: TENURE, COMPENSATION, AND CAREER PATHWAYS: REEXAMINING THE FACULTY EMPLOYMENT RELATIONSHIP IN ACADEMIC MEDICINE (1996), featuring useful papers by former University of Virginia President Robert M. O'Neil ("*Reexamining the Meaning and Role of Tenure in Academic Medicine*") and Steven G. Olswang ("*Academic Freedom and Tenure: The United States and United Kingdom Experience*"); and LEGAL ISSUES IN FACULTY TENURE AND COMPENSATION (1997), featuring presentations by four attorneys on legal issues involving academic medical center faculty, including compensation, termination for cause, post-tenure review, and related subjects. These AAMC conference

year, many academic medical centers had adopted new compensation paradigms under which a portion but not all of a tenured faculty member's annual salary was explicitly protected against reduction – the implication being that institutions were free to effect salary reductions for tenured faculty members as long as adjusted salaries did not go below protected "floors."[10] Predictably, institutional policymaking in an area as sensitive as faculty compensation triggered expressions of alarm from many faculty members.

Under what circumstances (if any) and in accordance with what procedures can medical schools respond to budget deficits by adopting compensation policies that allow for reductions in the compensation of tenured faculty members? This question has already triggered grievances and litigation at several medical schools.[11] It is the postulate of this article that differences between faculty members and administrators over tenure and faculty compensation arise in part from lack of precision about the meaning of tenure and its historical and legal relationship to compensation. The purpose of this article is to limn the history of academic tenure in the United States – a history of surprising brevity and some ambiguity – and explain in light of that history what tenure means as a defining characteristic of higher education in this country and as a legal term in litigation over faculty compensation.

Part II of this article explores the historic antecedents of the modern concept of academic tenure. For at least three-quarters of a century, tenure has been justified on two independent grounds: as the surest way to safeguard the academic freedom of faculty members, and as a means of ensuring "economic security" for the professoriate. For most of that time, little attention was given to the latter justification. It is only in the last three years – literally – that the American Association of University Professors ("AAUP") and other thoughtful proponents of tenure have resurrected the "economic security" basis for tenure and sought to ascribe a meaning to that term; and it is only in the last three years that faculty litigants have advanced the theory that alterations in an institution's policies governing faculty compensation threaten the faculty's "economic security," hence tenure itself.

Part III examines the contemporary meaning of academic tenure. It enumerates the procedural protections that attach, as a matter of contract law, when tenure is bestowed on a faculty member, and describes the circumstances – substantive and procedural – under which the employing institution of higher

materials are particularly useful to those who wish to explore the relationship between academic tenure and faculty compensation policies. Copies of conference materials can be obtained from Dr. Robert F. Jones, Associate Vice President, Section for Institutional and Faculty Policy Studies, AAMC, 2450 N Street, N.W., Room 411, Washington, D.C. 20037, or from the AAMC at <http://www.aamc.org>.

10. For illustrations of policies incorporating so-called "X-Y-Z" compensation formulae, see Jones & Gold, *supra* note 4, at 217-18.

11. *See* discussion *infra* Part IV.

education can terminate a tenured faculty appointment. Part III concludes by examining the AAUP report entitled *Tenure in the Medical School*.[12] Published in 1996, this report was of path-breaking importance in that it represented the first sustained attempt to give content to the term "economic security" and to delineate the parameters of a medical school's ability, consistent with tenure, to modify compensation policies for tenured faculty.

Finally, Part IV summarizes the modest amount of litigation that has been spawned by salary reductions affecting tenured faculty members. In the last two years, the number of lawsuits brought by tenured medical school faculty members has slowly grown, and it is not too early to draw some conclusions about judicial reactions to the argument by faculty members that the "economic security" dimension of tenure protects them against changes in compensation policies occasioned by financial distress at the medical schools in which they are employed. As we shall see, courts have so far been resistant to that argument.

II. AN ABRIDGED HISTORY OF ACADEMIC TENURE IN THE UNITED STATES[13]

Tenure and the associated concept of hierarchical academic rank, including untenured instructors, untenured assistant professors, tenured associate professors, and tenured full professors, are relatively new phenomena in American higher education. The privately-supported, predominantly sectarian institutions of higher education founded in this country in the seventeenth,

12. *Tenure in the Medical School*, 82 ACADEME 40 (Jan.-Feb. 1996) (prepared by Committee A on Academic Freedom and Tenure, American Association of University Professors). ACADEME is the official publication of the AAUP.

13. It is impossible to write about the history of academic tenure in this country without borrowing heavily from the work of Professor Walter Metzger, the subject's preeminent authority. Although more than a quarter of a century old, Professor Metzger's 1973 essay *Academic Tenure in America: A Historical Essay* remains the best starting point for serious scholarship on the subject. *See* Walter Metzger, *Academic Tenure in America: A Historical Essay*, *in* COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, FACULTY TENURE 93 (1973) [hereinafter Metzger, *Academic Tenure*]. For those desiring an extended treatment of the topics covered in Professor Metzger's article, see ROBERT HOFSTADTER & WALTER P. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES (1955) [hereinafter HOFSTADTER & METZGER]. Published as part of Columbia University's "American Academic Freedom Project," this 527-page treatise comprehensively surveys the history of academic freedom and its relationship to academic tenure at American colleges and universities. Part I, written by Professor Hofstadter, focuses on what the authors call "the prehistory of academic freedom in our own country" from the founding of Harvard College in 1636 to the end of the Civil War. *See id.* at 78-113. Part II, written by Professor Metzger, *see id*. at 275-506, chronicles the coming of the modern university and the development of "[a] self-conscious and well-formulated rationale for academic freedom" based on freedoms asserted by faculty and students in the great German universities of that epoch. *See id.* at xii. Like other authors who precede me in exploring the history of academic tenure in the United States, I gratefully acknowledge Professor Metzger's contributions, reflected in what follows.

eighteenth, and early nineteenth centuries used governance structures and instructional methods derived in large measure from Oxford and Cambridge Universities, the institutions from which most of the colony's educators had graduated.[14] Governance was the responsibility of self-perpetuating boards of "fellows," who in turn appointed "tutors" to perform the mundane task of instructing students in class.[15] Until the middle of the eighteenth century, there was no rank higher than "tutor" on most American college faculties.[16] Tutors were appointed for short fixed terms, with no guaranteed right to reappointment for successive terms.[17]

Beginning in the middle of the eighteenth century, colleges used gifts from merchants and wealthy graduates to establish endowed chairs, and chairholders were given an exalted title new to American institutions: professor.[18] In deliberate contrast to the lowly tutors, professorial appointments were without limit of time, although governing boards could terminate professors for inadequate performance of duty or misconduct.[19]

A. The Forces that Shaped Modern Academic Tenure

For much of the eighteenth century, tenure was defined more by what it was not than by what it actually signified. Eighteenth-century tutors were ordinarily engaged under short "term" appointments, and were required to stand for reappointment every two or three years.[20] In contrast, bequests establishing new professorships frequently fixed the appointment "durante vita" -- for the life of the incumbent.[21] Professors were freed from the obligation to apply for reappointment at periodic intervals, although, as historians observed, this was far from tenure in the modern sense given the ease with which professors could be dismissed by governing boards for the most inconsequential of reasons.[22]

14. Metzger, *Academic Tenure*, *supra* note 13, at 114-16.

15. *Id*. at 110-11.

16. *Id.* at 120.

17. For a lively description of higher education in colonial America, see *id.* at 114-51. *See generally* LAURENCE R. VEYSEY, THE EMERGENCE OF THE AMERICAN UNIVERSITY (1965); SAMUEL ELIOT MORISON, THREE CENTURIES OF HARVARD 1636-1936 (1936).

18. Metzger, *Academic Tenure*, *supra* note 13, at 120.

19. HOFSTADTER & METZGER, *supra* note 13, at 230.

20. *See supra* notes 16-17 and accompanying text.

21. Metzger, *Academic Tenure*, *supra* note 13, at 120.

22. HOFSTADTER & METZGER, *supra* note 13, at 230 (noting that "[a]lthough a professor usually held office indefinitely on good behavior, his tenure depended upon usage and had no legal status" thus, "he could be fired at will by the governing board . . . [sometimes without] a hearing.").

Tenured faculty members who challenged their dismissals in court were singularly unsuccessful in the late nineteenth and early twentieth centuries. Typical of the judicial rhetoric of that era was the dismissive decision of *Hartigan v. Board of Regents of West Virginia*

The modern concept of academic tenure owes its existence to three great shaping events of the nineteenth and early twentieth centuries: exposure of American educators to the German university and the German concept of *lehrfreiheit*, loosely translated as a faculty member's academic freedom as a teacher and researcher; enactment of the Morrill Act in 1862; and a series of path-breaking court cases decided a century ago known collectively as the "Economics" cases.

1. The German Influence

At the beginning of the nineteenth century, American colleges were overwhelmingly sectarian. Their mission was to produce clergymen, and their method of instruction was primarily rote memorization.[23] Faculty did little original research, and scarcely imagined their mission to include training in scholarship.[24] But in the nineteenth century, more than nine thousand Americans studied in what were at that time the world's preeminent research universities, the universities of Germany, and many of them joined the teaching ranks when they completed their studies and returned to the United States.[25] While overseas, they discovered colleagues who envisioned their jobs as members of university faculties quite differently, due in part to the German concept of *lehrfreiheit*. "By *lehrfreiheit*," wrote Professors Hofstadter and Metzger, "the German educator meant two things [:]"

> He meant that the university professor was free to examine bodies of evidence and to report his findings in lecture or published form -- that he enjoyed freedom of teaching and freedom of inquiry . . . . This freedom was not, as the Germans conceived it, an inalienable endowment of all men, nor was it the superadded attraction of certain universities and not of others; rather, it was the

University, 38 S.E. 698 (W. Va. 1901). *Hartigan* involved a university president who asked the board of regents to terminate the appointment of an anatomy professor who had served on the faculty for thirteen years. The president accused the professor of being "untruthful [and] unscientific" and of being "wasteful of the university property committed to his charge . . . ." *Id.* at 706 (Dent, J., dissenting). The board ordered that the university terminate the professor's appointment without notice. When the professor sought a writ of prohibition restraining the board from carrying out its order, the court ruled that it had no jurisdiction to review actions by governing boards affecting the employment of faculty members: "Some one will ask, is the board of regents to do as it pleases, without control, erroneous as its actions may be? Yes, so far as the courts are concerned." *Id.* at 700.

Other nineteenth century courts were hostile to faculty members in cases involving terminations of long-term appointments. *See, e.g.*, Gillan v. Board of Regents of Normal Schs., 58 N.W. 1042 (Wis. 1894); Devol v. Board of Regents of Univ. of Ariz., 56 P. 737 (Ariz. 1899); Ward v. Board of Regents of Kan. State Agric. College, 138 Fed. 372 (8th Cir. 1905); Darrow v. Briggs, 169 S.W. 118 (Mo. 1914).

23. HOFSTADTER & METZGER, *supra* note 13, at 229.

24. *Id*. at 369.

25. *Id*. at 367.

> distinctive prerogative of the academic profession, and the essential condition of all universities. In addition, *lehrfreiheit* . . . also denoted the paucity of administrative rules within the teaching situation: the absence of a prescribed syllabus, the freedom from tutorial duties, the opportunity to lecture on any subject according to the teacher's interest. Thus, academic freedom, as the Germans defined it, was not simply the right of professors to speak without fear or favor, but the atmosphere of consent that surrounded the whole process of research and instruction.[26]

Exposure to German academic governance opened the eyes of the American professoriate to the hitherto radical notion that academic freedom protected faculty members from the very powers that were responsible for their appointment and continued employment: trustees and administrators. In a florid passage from his 1869 inaugural address as President of Harvard University, Charles W. Eliot extolled freedom from institutional interference as the quintessential faculty right:

> A university must, . . . above all, . . . be free. The winnowing breeze of freedom must blow through all its chambers. It takes a hurricane to blow wheat away. An atmosphere of intellectual freedom is the native air of literature and science. This university . . . demands of all its teachers that they be grave, reverent and high-minded; *but it leaves them, like their pupils, free.*[27]

In 1876, the Johns Hopkins University was founded as the first American institution offering graduate education on the German model.[28] The avowedly nonsectarian universities that opened their doors at the end of the century – Chicago and Stanford foremost among them – hired faculty members who were expected for the first time to engage in rigorous research.[29] As curricular

26. *Id.* at 386-87. *See* Walter P. Metzger, *The German Contribution to the American Theory of Academic Freedom*, *in* THE AMERICAN CONCEPT OF ACADEMIC FREEDOM IN FORMATION: A COLLECTION OF ESSAYS AND REPORTS 215 (Walter P. Metzger ed., 1977).

Professors Hofstadter and Metzger reproduce correspondence exchanged in 1815 between the man who was soon to be the first president of the University of Virginia, Thomas Jefferson, and a young Harvard faculty member named George Ticknor whom Jefferson hoped to lure away to his new university. After Ticknor visited the University of Gottingen, he wrote to Jefferson:

> No matter what a man thinks, he may teach it and print it; not only without molestation from the government but also without molestation from publick [sic] opinion . . . . If truth is to be attained by freedom of inquiry, as I doubt not it is, the German professors and literati are certainly on the high road, and have the way quietly open before them.

HOFSTADTER & METZGER, *supra* note 13, at 391.

27. *Id.* at 394 (emphasis added).

28. DONALD KENNEDY, ACADEMIC DUTY 26 (1997). Of the fifty-three Hopkins faculty members when the university was first established, nearly all had studied at German universities. They adopted the German method of instruction, relying on lectures, seminars, and laboratories. So profound was the German influence on pedagogy at Hopkins that the new university was called "Göttingen at Baltimore." HOFSTADTER & METZGER, *supra* note 13, at 377.

29. KENNEDY, *supra* note 28, at 26-27.

boundaries expanded, so did the potential for ideological friction between faculty and trustees – and so did the perceived need for procedures to protect the academic freedom of faculty members.

2. The Morrill Act

The Morrill Act expanded and democratized American higher education in the years after the Civil War by making public lands available for the establishment of so-called "land-grant colleges."[30] Impetus behind the Morrill Act began with the great London and New York expositions of the 1850s, which showcased the scientific and technological advances of the Industrial Revolution and persuaded a generation of American educators that the standard curriculum of the day was "hopelessly antiquated."[31] The Morrill Act gave to every state that remained in the Union a minimum grant of 90,000 acres of public land to establish colleges dedicated to engineering, agriculture, mechanical arts, and vocational training.[32] Subsequent legislation, enacted in 1890, extended the land-grant college program to the southern states that had seceded during the Civil War.[33]

For our purposes, the significance of the land-grant college enactments lay in the large-scale increase of college and university faculty members in the latter part of the nineteenth century, all of whom were state government employees who enjoyed defined employment rights under state law. The land-grant colleges, including the University of Wisconsin in the 1870s and Cornell University in the 1880s, divided professorial rank into three sub-ranks: assistant, associate, and full professor.[34] These land-grant colleges also developed codified procedures governing advancement from one rank to the next.[35] Additionally, most colleges and universities during this period adopted the notion of "probationary service" prior to advancement to a tenured rank, and the correlative "up or out" rule at the end of the probationary period.[36]

3. The Celebrated "Economics" Cases

Ideological turbulence roiled the economics profession at the beginning of the twentieth century, as traditional business-oriented departments of economics were challenged by a new generation of radical faculty members who espoused free trade, the abandonment of the gold standard, the regulation

30. Morrill Act, ch. 130, 12 Stat. 503 (1862) (which "apportion[ed] to each State a quantity [of public land] equal to thirty thousand acres for each senator and representative in Congress").

31. ALLAN NEVINS, THE STATE UNIVERSITIES AND DEMOCRACY 2 (1962).

32. Morrill Act, 12 Stat. 503. *See also* METZGER & HOFSTADTER, *supra* note 13, at 380-82.

33. *See* 26 Stat. 417 (1890) (giving funds from the sale of public lands to "each State and Territory for the more complete endowment and maintenance of colleges").

34. Metzger, *Faculty Tenure*, *supra* note 13, at 123.

35. *Id*.

36. *Id*. at 121.

of monopolies, public ownership of utility companies, and other positions deemed heretical by the corporate magnates serving as trustees at most of the public and private institutions of the day.[37] Not surprisingly, schisms developed within leading economics departments and between radical economists and conservative university presidents and trustees.

Professors Hofstadter and Metzger brilliantly describe the origins of the ideological confrontations that repeatedly disrupted economics departments at major universities at the end of the nineteenth century.[38] For the first time in the nation's history, industrialists were making large fortunes and using them to support universities on an unprecedented scale. "Inevitably," Hofstadter and Metzger dryly observed, "the increase in the size of gifts changed the relations of donor and recipient. Borrowing a term from economic history, one may say that the givers became entrepreneurs in the field of higher education."[39] Just as inevitably, enormous gifts were rewarded with appointments to institutional governing boards; "[t]hus, big businessmen and professors came into fateful contact."[40]

Economics departments proved to be a particularly combustible meeting place. In 1901, the former President of Kansas State Agricultural College, Thomas Elmer Will, wrote that at least twelve faculty members from economics and political science departments had been removed from tenured positions in the preceding eight years for espousing "heretical social and economic writings" on such topics as the need to regulate monopolies, the advantages of free silver, the anti-democratic impulses of imperialism, and the need for immigration reform.[41] The most notorious of these cases involved Edward A. Ross, a tenured professor of economics at Stanford University. In

37. HOFSTADTER & METZGER, *supra* note 13, at 413.

38. *Id*.

39. *Id*. at 414.

40. *Id.* at 418. Before the Civil War, the largest philanthropic gift ever given to an American college was Abbott Lawrence's $50,000 gift to Harvard. But in the 1880s, the estate of a California railroad magnate contributed $24 million to establish Stanford University; the founder of Standard Oil gave $34 million to the University of Chicago; and John D. Rockefeller contributed $46 million to establish a foundation called the General Education Board to provide financial support to secondary and postsecondary schools throughout the United States. *Id.* at 413-14.

41. *Id.* at 420-21. President Will viewed the decade's developments from a unique vantage point. In the election of 1896, Republican Party majorities in both houses of the Kansas legislature were displaced by a coalition of Democrats and Populists, who immediately assumed control of the governing board of the state land-grant college. All faculty contracts in the economics department were terminated, and Will, an advocate of reform and a friend of Populist legislators, was appointed to the presidency. Two years later, the Republican Party returned to power. Will was dismissed, a new president was installed, the appointments of all the new members of the economics department were terminated, and their places were filled with loyal Republicans. *Id.* at 424-25.

1900, Stanford's legendary President David Starr Jordan dismissed Professor Ross at the insistence of university trustee Jane Lathrop Stanford, the widow of the University's founder, Leland Stanford.[42] Mrs. Stanford's well-connected industrialist friends were offended by Professor Ross's unorthodox advocacy of populist economic policies.[43] Because of Ross's national prominence as secretary of the American Economic Association and the fledgling university's academic aspirations, Ross's firing captured the attention and imagination of the national media, who "seized upon the incident as a parable of the fate of liberal professors in institutions dominated by the moneyed class."[44]

Matters worsened in 1913, when another prominent economics professor, William Fisher, resigned from the Wesleyan University faculty at the insistence of the institution's president.[45] Professor Fisher's offense was the off-campus delivery of a speech that advocated relaxing the rigid rules for the observance of the Sunday Sabbath. Professor Fisher's colleagues were outraged when they learned of the president's action and the Economics Department chairman -- who had himself resigned in protest from the Stanford faculty in the wake of the Ross firing -- tried to organize a faculty boycott of the president's efforts to hire a replacement for Professor Fisher.[46] Other faculty members sought to interest the American Economic Association in conducting an investigation, but their effort yielded no published result because, as Professor Metzger tersely reports, "the chairman [of the investigating committee] became convinced that Fisher had not been faultless in conduct and because he wished to reserve full reportage for the worthy pure."[47]

These "Economics" cases offered an important lesson for thoughtful proponents of faculty rights. The cases showed that presidents, trustees, and other powerful people who were opposed to the expression of unorthodox views and willing to use their power to suppress such expression could repeatedly threaten academic freedom. By the beginning of the twentieth century leaders in the American academic community were tentatively beginning to draw the connection between two strands of thought -- one philosophical, one legal. The German-inspired notion that a university could achieve greatness only by according faculty the unfettered right to determine for themselves what to teach and how to teach it became linked to the need for a codified system of procedural protections that would shield faculty members who exercised their academic freedom from the intemperate reactions of

42. Metzger, *Academic Tenure*, *supra* note 13, at 138.

43. *Id*. Ross campaigned for free silver, a ban on oriental immigration, municipal ownership of utilities, and public scrutiny of the Southern Pacific Railroad. *Id.*

44. *Id*. at 139.

45. *Id*. at 146.

46. *Id*. at 147.

47. Metzger, *Academic Tenure*, *supra* note 13, at 148.

administrators and trustees. Professors Hofstadter and Metzger describe the moment these two strands first converged in a significant way, when Harvard's venerated President Charles W. Eliot delivered the Phi Beta Kappa address at that institution's commencement exercises in 1907.[48] Invoking more than a decade's turbulence in departments of economics at Harvard and other universities, Eliot focused his remarks on fractious relations between professors and lay boards of trustees: "[S]o long as . . . boards of trustees of colleges and universities claim the right to dismiss at pleasure all the officers of the institution in their charge, . . . there will be no security for the teachers' proper freedom . . . ."[49] Eliot's statement was one of the first explicit links drawn between *academic freedom* as a defining characteristic of American higher education and protections afforded by *tenure* as a means of safeguarding academic positions against administrative encroachment.

As originally conceived a century ago, academic tenure was a means to nurture and protect academic freedom. Conspicuously absent from the rhetoric of that era was any reference to tenure as a way to enhance the economic stature of faculty members. In fact, faculty members, if not wealthy, were comparatively well-to-do in pre-industrial America. At the end of the nineteenth century, professors' salaries were seventy-five percent higher than those of clerical workers; seventy-five percent higher than those of Methodist and Congregational ministers; significantly higher than the wages of social workers, librarians, journalists, and other categories of professionals; and *three hundred percent* higher than the wages of manual laborers.[50] It was not until 1915 and "[t]he addition of a new wealthy extreme" to American society in the form of industrialists, financiers, and others who earned fortunes in the years before the Great War that compensation first emerged as a faculty concern bearing a relationship to the justification for academic tenure.[51]

B. The Founding of the American Association of University Professors

In 1913 Arthur Lovejoy, a philosophy professor at the Johns Hopkins University, and seventeen other Hopkins professors circulated a letter to

48. HOFSTADTER & METZGER, *supra* note 13, at 398.

49. *Id*.

50. *See* HOFSTADTER & METZGER, *supra* note 13, at 466 n.181.

51. Professors Hofstadter and Metzger note:

> The addition of a new wealthy extreme to the range of classes in America seemed to depress and demote all the others. Compared with the enormous returns that accrued to business, the professor's emoluments seemed small. Compared with the high adventure of finance and the epics of industrial derring-do, his existence seemed drab. Compared with the honors heaped on the practical men, the distinctions accorded the thinking man seemed grudging and picayune. The illusion of a paradise lost was viewed against a perceptual field of sharp contemporary social contrasts.

Id. at 467.

colleagues at nine leading American universities urging them to support the formation of a national association of professors. Six hundred professors accepted Professor Lovejoy's invitation to become charter members of the new organization, christened the American Association of University Professors ("AAUP").[52]

Professor Lovejoy proposed two principal tasks for the new organization: (1) "the gradual formulation of general principles respecting the tenure of the professional office and the legitimate ground for the dismissal of professors," and (2) the establishment of "a representative judicial committee to investigate and report in cases in which freedom is alleged to have been interfered with by the administrative authorities of any university . . . ."[53] Professor Metzger captures the significance of Professor Lovejoy's formulation of the AAUP's two principal undertakings:

> The first proposal looked forward to tenure rules that would be shaped to the interest of professors rather than to the interest of lay controllers and that would be standardized for the entire nation rather than left to each campus ward. The second proposal, remarkable for its audacity, urged the organized professors to set themselves up as the judges of administrative conduct in all those tangled and bristling affairs that end in academic dismissals. *But it was in the joining of these two proposals that their historic significance can be said to lie.* For many years, professors had evidenced concern about their security of tenure. And for many years . . . professors had sought 'academic freedom' – immunity from institutional sanctions in matters of expression and belief. *What was so unusual and worthy of mark was the marriage of these two concerns in one professional plan of action.*[54]

The AAUP's first significant achievement was the formulation in 1915 of the *General Declaration of Principles* ("1915 *General Declaration*").[55] The 1915 *General Declaration* was one of the first efforts to draw an explicit analytic connection between academic freedom as the defining characteristic of American higher education and tenure as the most effective means for preserving and protecting academic freedom.[56] More important for our purposes, the 1915 *General Declaration* contributed another important strand to the development of academic tenure in the United States: the articulation of

52. Metzger, *Academic Tenure*, *supra* note 13, at 138. The founding of the AAUP is amply chronicled in essays, reports and books authored, in the main, by members of the AAUP's Committee A on Academic Freedom and Tenure. *See, e.g.*, Ralph F. Fuchs, *Academic Freedom—Its Basic Philosophy, Function, and History*, 28 LAW & CONTEMP. PROBS. 3 (1965), *reprinted in* ACADEMIC FREEDOM AND TENURE, at 242, 253 (Louis Joughin ed., 1967); HOFSTADTER & METZGER, *supra* note 13, at 468-90.

53. Metzger, *Academic Tenure*, *supra* note 13, at 135-36 (citation omitted).

54. *Id.* at 136 (emphasis added).

55. *See* 1915 GENERAL REPORT OF THE COMMITTEE ON ACADEMIC TENURE, *reprinted in* FREEDOM AND TENURE IN THE ACADEMY 393 (William W. Van Alstyne ed., 1993).

56. *Id*. at 399, 405-06.

a link between academic tenure and faculty compensation.[57] In a long passage, the 1915 *General Declaration* addressed, for the first time, the financial aspirations of university faculty members and offered a rationale for tenure as a substitute for wealth:

> If education is the corner stone of the structure of society and if progress in scientific knowledge is essential to civilization, few things can be more important than to enhance the dignity of the scholar's profession, with a view of attracting into its ranks men of the highest ability . . . . This is the more essential because the pecuniary emoluments of the profession are not, and doubtless never will be, equal to those open to the more successful members of other professions. It is not, in our opinion, desirable that men should be drawn into this profession by the magnitude of the economic rewards which it offers; but it is for this reason the more needful that men of high gifts and character should be drawn into it by *the assurance of an honorable and secure position* . . . .[58]

In 1925, the American Council on Education called a conference for the purpose of discussing the principles of academic freedom and tenure.[59] Representatives of the AAUP and other higher education organizations were invited to attend. The conference's tangible product was the 1925 statement from its *Conference on Academic Freedom and Tenure* ("1925 *Conference Statement*"), a document remarkable for two reasons: first, because it constituted an explicit endorsement by a body of college presidents of the principle that academic tenure is essential to safeguard the academic freedom of faculty members; and second, because it was the first effort to develop codified rules of fair procedure for the adjudication of tenure-related disputes by faculty bodies.[60]

C. The 1940 Statement of Principles on Academic Freedom and Tenure

The 1940 *Statement of Principles on Academic Freedom and Tenure* ("1940 *Statement of Principles*") is widely accepted and widely cited as the most influential expression of tenure principles to be found anywhere in the

57. *Id.* at 397, 405-06.

58. *Id.* at 396 (emphasis added).

59. *See* Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, 53 LAW & CONTEMP. PROBS. 3, 26 (1990).

60. Metzger, *Academic Tenure*, *supra* note 13, at 151-52. The 1925 *Conference Statement* is reprinted in XI AAUP BULL. 99 (1925). The 1925 *Conference Statement* was notable in another pertinent respect. It was the first document to posit that "financial exigency" could serve under appropriate circumstances as a justification for terminating tenured appointments. Although it did not define the term, it did provide that "[t]ermination of permanent or long-term appointments because of financial exigencies should be sought only as a last resort, after every effort has been made to meet the need in other ways and to find for the teacher other employment in the institution." XI AAUP BULL., at 101.

extensive literature on American higher education.[61] Elaborating on themes tentatively expressed in the 1915 *General Declaration* and 1925 *Conference Statement*, the 1940 *Statement of Principles* explains tenure's central purposes:

> Tenure is a means to certain ends; specifically (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.[62]

Here, in a form more succinct than in the 1915 *General Declaration*, the AAUP drew a direct analytic connection between tenure and faculty compensation.[63] As we shall see, however, it was not until the mid-1990s that the AAUP endeavored to give any content to the "economic security" language in the 1940 *Statement of Principles*.

III. TENURE AS A CONTRACTUAL CONCEPT

A. The Contractual Meaning of Academic Tenure.

Tenure is a contractually enforceable institutional promise relating to the duration of a faculty appointment.[64] As past AAUP General Counsel William Van Alstyne notes:

> Tenure, accurately and unequivocally defined, lays no claim whatever to a guarantee of lifetime employment. Rather, tenure provides only that no person

61. The definitive history of the 1940 *Statement of Principles* was written in 1990, on the fiftieth anniversary of the 1940 *Statement of Principles'* adoption, by none other than Professor Walter Metzger. *See* Metzger, *supra* note 59, at 3. For other treatments of the central role of the 1940 *Statement of Principles* in the history and development of academic freedom and tenure in the United States, see Matthew W. Finkin, *Regulation by Agreement: The Case of Private Higher Education*, 65 IOWA L. REV. 1119, 1150-51 (1980) (noting that "[t]he 1940 *Statement* . . . has become so widely accepted throughout American higher education that it has achieved judicial recognition as a usage of the profession"); HARRY T. EDWARDS & VIRGINIA DAVIS NORDIN, HIGHER EDUCATION & THE LAW 218 (1979) ("[t]he definition of tenure which is most prevalent in American higher education is found in the 1940 *Statement of Principles*").

62. *1940 Statement of Principles on Academic Freedom and Tenure, reprinted in* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, POLICY DOCUMENTS & REPORTS 3 (1995) [hereinafter AAUP POLICY DOCUMENTS & REPORTS]. This compendium, commonly called the "Redbook," encompasses the full range of AAUP policy statements, from the 1940 *Statement of Principles* to detailed implementing policies on governance, professional ethics, discrimination, student rights, fringe benefits, and many other subjects. The volume includes a good index, a bibliography and useful essays explaining how the AAUP adopts policies and how AAUP policies are interpreted and applied by the courts.

63. *Id.*

64. *See* William Van Alstyne, *Tenure: A Summary, Explanation and "Defense,"* 57 AAUP BULL. 328, 328 (1971).

> continuously retained as a full-time faculty member beyond a specified lengthy period of probationary service may thereafter be dismissed without adequate cause .... [T]enure is translatable principally as a statement of formal assurance that . . . the individual's professional security and academic freedom will not be placed in question without the observance of full academic due process.[65]

In accordance with the law of contracts, tenure means two things. First and most important, a tenured appointment has no specified end date and is therefore an appointment of *indefinite term*. Second, a tenured appointment can be terminated only for *reasons* and only in accordance with *procedures* that are specified as part of the contract and understood by the parties at the time they enter into the employment relationship.[66]

The contract rights of faculty members are defined in many places, the most significant of which are:

- The institution's governing documents (charter, bylaws, state statutes, institutional regulations, and so forth);
- The faculty handbook; and
- The faculty member's individual employment contract or appointment letter.[67]

Tenure exists at a particular institution only if it is identified in the governing documents, the handbook, or elsewhere as a contract right belonging to eligible faculty members. Individual institutions are free to depart from traditional notions of academic tenure, and even to do away with tenure altogether. In fact, however, tenure is virtually universal in American colleges

65. *Id.* at 328 (emphasis added).

66. *See* Ronald C. Brown, *Tenure Rights in Contractual and Constitutional Context*, 6 J.L. & EDUC. 279, 280 (1977) ("[t]he legal effect of a tenure system is to place restrictions on the power of the employing institution to terminate tenured professors except for cause and after a hearing"); American Ass'n of Univ. Professors v. Bloomfield College, 322 A.2d 846, 853 (N.J. Super. Ct. Ch. Div. 1974) ("[a]lthough academic tenure does not constitute a guarantee of life employment . . . it denotes clearly defined limitations upon the institution's power to terminate the teacher's services"), *aff'd*, 346 A.2d 615 (N.J. Super. Ct. App. Div. 1975).

67. *See* Brown, *supra* note 66, at 281 (noting that "[q]uite commonly the authority to grant tenure may be found in a comprehensive statutory scheme which provides the right to continued employment subject only to removal in a prescribed manner for enumerated causes"); *see also id.* at 282-84 (discussing the incorporation of handbook provisions into the tenure contract and other sources of contractual rights). At most institutions, the handbook contains detailed definitions of faculty ranks; prescribes the procedure by which faculty members are appointed, promoted, and given tenure; establishes a maximum probationary period; and describes both the standards the institution will employ to determine whether a tenured faculty appointment (or a non-tenured appointment during the term of the appointment) should be terminated and the procedures to be used in effecting that decision.

and universities, and more than ninety-five percent of North American medical schools have formal tenure systems for their faculty.[68]

What does it mean to say that tenure is a contractual concept? It means, simply, that the tenure provisions in the institution's faculty handbook and tenure policies rise to the level of *contractually enforceable institutional promises* that (1) cannot be modified unilaterally by the institution, and (2) can give rise to pecuniary damage claims against the institution if they are breached or not observed. Phrased more formally, the inclusion of tenure provisions in a faculty handbook or institutional policy will usually be construed by a reviewing court as an abrogation of the traditional common-law "employment at will" doctrine. As the courts have held in a series of cases over the last two decades, the tenure terms in faculty handbooks and institutional policies become part of the employment contract between faculty member and institution, regardless of whether or not they are incorporated by specific reference in the individual faculty member's appointment letter.[69]

The AAUP's role in giving content to the term "tenure" and associated terms is twofold. First, many faculty handbooks adopt the definitions of tenure and academic freedom derived from the landmark 1940 *Statement of Principles* and other AAUP policy documents as contractually enforceable institutional policy. Some institutions do this by making specific references in their handbooks to the 1940 *Statement of Principles*; others do it by reproducing or paraphrasing the texts of pertinent AAUP policies. Even in the absence of specific incorporation of AAUP terminology in institutional documents, ambiguities about contract terms can be resolved under principles of contract law by examining industrial "custom and usage," and there is no doubt that AAUP tenure standards are widely recognized as institutional norms in American higher education.[70]

B. The Commonly Understood Contractual Guarantees Associated with Tenure

The 1940 *Statement of Principles* enumerates the essential requirements of academic tenure:

68. *See* Jones & Gold, *supra* note 4, at 212.

69. *See, e.g.*, Moffie v. Oglethorpe Univ., Inc., 367 S.E.2d 112, 115 (Ga. Ct. App. 1988); McConnell v. Howard Univ., 818 F.2d 58, 62-3 (D.C. Cir. 1987); Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 885 (Mich. 1980); Rehor v. Case Western Reserve Univ., 331 N.E.2d 416, 420 (Ohio 1975).

70. *See generally* Ralph S. Brown, Jr. & Matthew W. Finkin, *The Usefulness of AAUP Policy Statements*, 64 AAUP BULL. 5, 8 (1978). For examples of the many instances in which courts have used AAUP policy statements as guidelines for interpreting institutional tenure policies, *see, e.g.*, Krotkoff v. Goucher College, 585 F.2d 675, 678 (4th Cir. 1978); Browzin v. Catholic Univ. of Am., 527 F.2d 843, 846 (D.C. Cir. 1975); Karlen v. New York Univ., 464 F. Supp. 704, 707 (S.D.N.Y. 1979); Drans v. Providence College, 410 A.2d 992, 994 (R.I. 1980).

- A written contract of employment clearly setting forth the precise terms and conditions governing the appointment;
- A probationary period of specified maximum length;
- The notion that a term appointment cannot be non-renewed without providing a minimum notice period to the affected probationary faculty member; and
- Minimum procedural standards for the termination of a tenured appointment for cause.[71]

It also recognizes that, under certain circumstances, a tenured appointment may be terminated because of a *financial exigency*, a concept given content in other AAUP policy documents.[72]

As already noted, a tenured faculty appointment can be terminated only for *reasons* and only in accordance with *procedures* that are specified as part of the contract and understood by the parties at the time they enter into the employment relationship. Under the law of contracts, an institution of higher education owes legally enforceable obligations to tenured faculty members in those rare instances when it seeks to terminate a faculty appointment. The institution owes the faculty member a legitimate *reason* for its action and a set of agreed-upon *procedural protections* before the termination is effected.

1. Reasons Warranting Termination of Tenured Appointments

A tenured appointment can be terminated only for *reasons*. Under the AAUP's definition of tenure and under the tenure policies at most institutions of higher education in this country, "reasons" sufficient to support the termination of a tenured appointment fall within two categories: "cause" and "reasons unrelated to cause."

a. Terminations for Cause

Under AAUP policy, an institution is free to define for itself the standards constituting ground for for-cause termination, as long as those grounds "relat[e], directly and substantially, to the fitness of faculty members in their professional capacities as teachers or researchers."[73] One of the most widely respected definitions of "adequate cause" was formulated almost thirty years

71. *See 1940 Statement of Academic Principles on Academic Freedom and Tenure*, *in* AAUP POLICY DOCUMENTS & REPORTS, *supra* note 62, at 4. For a comprehensive review of academic due process, see Louis Joughin, *Academic Due Process*, 28 LAW & CONTEMP. PROBS. 573 (1963).

72. Financial exigency and the allied concept of program discontinuation are discussed *infra* Part III.B.1.b.

73. *Recommended Institutional Regulations on Academic Freedom and Tenure*, Reg. 5(a), *in* AAUP POLICY DOCUMENTS & REPORTS, *supra* note 62, at 26.

ago by the Commission on Academic Tenure in Higher Education. Under that definition, adequate cause exists if the institution can show:

> (i) [D]emonstrated incompetence or dishonesty in teaching or research,
>
> (ii) [S]ubstantial and manifest neglect of duty, . . . [or]
>
> (iii) [P]ersonal conduct which substantially impairs the individual's fulfillment of his [or her] institutional responsibilities.[74]

Not only are these grounds narrow and highly qualified (e.g., "*demonstrated* incompetence" and "*substantial* and *manifest* neglect of duty"), but at most institutions the body hearing the charges and deciding the accused faculty member's fate consists predominantly, or even wholly, of fellow faculty members—a potentially difficult forum before which to argue the institution's case.

b. Terminations Not for Cause

AAUP policy recognizes three narrow circumstances in which a tenured faculty appointment may be terminated for reasons unrelated to the fitness of the faculty member. These circumstances include financial exigency, program discontinuation, and institutional merger or affiliation.

i. Financial exigency

The 1940 *Statement of Principles* contains two passing references to financial exigency. Without defining the term, the 1940 *Statement of Principles* provides that the service of a tenured faculty member can be terminated "only for adequate cause, except . . . under extraordinary circumstances because of financial exigency."[75] Five paragraphs later, it returns to the subject, stating that "[t]ermination of a continuous appointment because of financial exigency should be demonstrably *bona fide*."[76] It was not until the mid-1970s that the AAUP first devoted sustained attention to the meaning of financial exigency and the circumstances under which a financially troubled institution could invoke it as the justification for terminating tenured faculty appointments.[77] In 1975, the AAUP comprehensively revised its

74. COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION, FACULTY TENURE, *supra* note 13, at 75.

75. *1940 Statement of Principles on Academic Freedom and Tenure*, *reprinted in* AAUP POLICY DOCUMENTS & REPORTS, *supra* note 62, at 4.

76. *Id.*

77. *See* Ralph S. Brown, Jr., *Financial Exigency*, 62 AAUP BULL. 5 (1976). "Most of the relevant policy formation [was] . . . first published in 1968. When the test of Regulation 4 seemed to need explanation . . . a major expansion on Regulation 4 got under way. After Committee A and the council had twice overhauled it, the current version was first published in . . . 1975 . . . ." *Id.* at 6.

recommended institutional regulation on termination of faculty appointments. The revised regulation contained lengthy provisions on financial exigency and the related concept of program discontinuation.[78] Almost immediately, courts looked to the AAUP definitions as the dispositive starting point for analysis of financially-inspired tenured terminations.[79]

A tenured faculty appointment may be terminated if that is the only way for an institution to cope with a financial exigency, restrictively defined under AAUP policy as "an imminent financial crisis which threatens the survival of *the institution as a whole* and which cannot be alleviated by less drastic means."[80] The AAUP definition is, in the words of the AAUP's expert on

78. *See Recommended Institutional Regulations on Academic Freedom and Tenure*, Reg. 4, *in* AAUP POLICY DOCUMENTS & REPORTS, *supra* note 62, at 23.

79. *See, e.g.*, Mabey v. Reagan, 537 F.2d 1036 (9th Cir. 1976); *Browzin*, 527 F.2d 843.

Lest there be any confusion, it is worth repeating an elementary truism under the law of contracts. The AAUP's standards on financial exigency and program discontinuation do not apply at a given college or university unless those standards have been incorporated by reference into the contractual employment relationship between institution and faculty member, for example, by appropriate reference in the faculty handbook or board-approved tenure policies. *See, e.g.*, Linn v. Andover Newton Theological Sch., Inc., 874 F.2d 1, 4-5 (1st Cir. 1989). Few institutions have adopted the AAUP recommended institutional regulation *in toto*; in fact, not many institutions have adopted financial exigency standards in any form. The importance of AAUP pronouncements in this area arises because the 1940 *Statement of Principles* incorporates the ambiguous reference to financial exigency. Given the prominence of the 1940 *Statement of Principles* in defining the institutional common law of tenure, and given the deference courts pay to the 1940 *Statement of Principles*, a faculty member would be hard pressed to argue that a tenured faculty appointment could not be terminated on financial exigency grounds, just as an institution would be hard pressed to maintain that the AAUP's definition of financial exigency would not be analytically useful in the absence of institution-endorsed alternative language. *See Krotkoff*, 585 F.2d at 678 (noting that "[t]he national academic community's understanding of the concept of tenure incorporates the notion that a college may refuse to renew a tenured teacher's contract because of financial exigency so long as its action is demonstrably bona fide").

80. *Recommended Institutional Regulations on Academic Freedom and Tenure*, Reg. 4(c)(1), *in* AAUP POLICY DOCUMENTS & REPORTS, *supra* note 62, at 23 (emphasis added).

The AAUP policies on financial exigency and program discontinuation are masterfully explained in an article by Professor Ralph Brown that appeared in ACADEME in early 1976. Professor Brown, a member of the faculty at Yale Law School, served for many years as the AAUP's General Counsel and as a member of the Association's Committee A on Academic Freedom and Tenure. In 1975, the AAUP revised its recommended institutional regulations on financial exigency and program discontinuation, and Professor Brown's 1976 article endeavors to explain the rationale for the AAUP policies and the meanings of key terms used in those policies. No article treats the AAUP's approach to these controversial subjects more lucidly than this one. *See* Brown, *supra* note 77. For other commentaries on the AAUP's policies on financial exigency and program discontinuation, see David Fellman, *The Association's Evolving Policy on Financial Exigency*, 70 ACADEME 14 (May-June 1984); Robert Charles Ludolph, *Termination of Faculty Tenure Rights Due to Financial Exigency and Program Discontinuation*, 63 U. DET. L. REV. 609 (1986).

financial exigency, Professor Ralph Brown, "an austere one."[81] Professor Brown continues:

> The Regulation is about termination of tenure appointments . . . . That is, it describes crisis circumstances when it becomes permissible to break contracts. This is a very serious thing to do, both as a matter of academic custom and of positive law. So straight off . . . let us try to maintain the distinction between conditions that permit on the one hand the firing of teachers with tenure . . . and, on the other, a wide range of consequences that may fall under the milder term "retrenchment." Hard times may call for retrenchment; *only a survival-threatening crisis* authorizes termination, as that word is used in the 1940 *Statement* . . . .[82]

The essence of financial exigency, then, as that term is used by the AAUP (and as many courts have held), is the notion of imminent institutional peril that can be alleviated only by terminating tenured faculty appointments.[83] While it is clear that the institutional governing board is entitled to declare financial exigency, and while courts will ordinarily defer to such declarations, it is also clear that courts will insist on objective indicia of *bona fide* financial distress, such as advance consultation with affected faculty governance organizations, efforts to place affected faculty members in other jobs, and observance of appropriate notice and severance-pay obligations.[84]

ii. Program discontinuation

Program discontinuation is a more controversial ground for terminating tenured appointments because it was not explicitly mentioned in the 1940 *Statement of Principles* and has been skeptically viewed by some faculty members as the exception that could swallow up the general rule. Under the AAUP's recommended institutional regulations, a tenured faculty appointment may be terminated if the institution elects, for programmatic reasons not related to financial exigency, to discontinue a particular program or department of instruction.[85] While the recommended AAUP policy is replete with

81. Brown, *supra* note 77, at 6.

82. *Id.* (emphasis added).

83. *Id*. *See Recommended Institutional Regulations on Academic Freedom and Tenure*, Reg. 4(c)(1), *in* AAUP POLICY DOCUMENTS & REPORTS, *supra* note 62, at 23.

84. *See, e.g.*, Gwen Seaquist & Eileen Kelly, *Faculty Dismissal Because of Enrollment Declines*, 28 J. LAW & EDUC. 193, 195-99 (1999).

85. *Recommended Institutional Regulations on Academic Freedom and Tenure*, Reg. 4(d), *in* AAUP POLICY DOCUMENTS & REPORTS, *supra* note 62, at 23. Professor Brown observed that "[r]ecognition [of the 'program discontinuation' rationale] has developed independently, and without any explicit foundation in the 1940 *Statement of Principles*. It is accepted as a fact of academic life that such events occur; and indeed it is healthy for the institution that they should." Brown, *supra* note 77, at 13. Some of the controversy surrounding the notion of program discontinuation owes its existence to the suspicion many faculty members have that

procedural limitations designed to narrow the circumstances under which a program can be discontinued with the resulting loss of tenured faculty positions,[86] these limitations have not stopped institutions from reducing the ranks of tenured faculty members through highly controversial discontinuations of academic programs and departments.[87]

iii. Institutional merger or affiliation

Under narrowly defined circumstances, it is arguably consistent with AAUP policy for one institution to void the appointments of tenured faculty members as part of that institution's merger into or affiliation with another.[88]

2. Procedures for Tenure Termination

A tenured faculty appointment can be terminated only in accordance with *procedures* that are specified as part of the contract, and understood by the parties at the time they enter into the employment relationship. These procedures usually entail at a minimum:

(a) A predetermination *hearing* before a body of faculty peers. At this hearing, the faculty member is entitled to certain procedural rights, such as receipt of a written set of charges, assistance from an "advisor" (who can, but does not necessarily have to be an attorney), and a stenographic record of the proceedings; and

(b) *Deference* to a suitable faculty role in institutional governance. Standards for terminating appointments as well as procedures for hearings cannot be imposed unilaterally by administrators; they must be formulated with due regard for faculty primacy in all matters relating to faculty status.[89]

"'discontinuance' may be invoked in hard times as a substitute, perhaps a subterfuge, for an exigency crisis that cannot be convincingly asserted." *Id.*

86. Under the AAUP's Recommended Regulation 4(d), an institutional decision to discontinue a program must be based "essentially upon educational considerations, as determined primarily by the faculty . . . ." The institution must make "every effort" to place a tenured faculty member in "another suitable position" instead of terminating the faculty member's employment. If the faculty member requires retraining in order to perform other duties, then the institution is obliged to offer "financial and other support" for such training. Faculty members who cannot be redeployed are entitled to "severance salary equitably adjusted to the faculty member's length of past and potential service." *Recommended Institutional Regulations on Academic Freedom and Tenure*, Reg. 4(d), *in* AAUP POLICY DOCUMENTS & REPORTS, *supra* note 62, at 25.

87. *See, e.g.*, Texas Faculty Ass'n v. University of Tex. at Dallas, 946 F.2d 379 (5th Cir. 1991); Jimenez v. Almodovar, 650 F.2d 363 (1st Cir. 1981).

88. *See generally Report: On Institutional Mergers and Acquisitions*, 68 ACADEME 1a (Mar.-Apr. 1982). *But cf.* Gray v. Mundelein College, 695 N.E.2d 1379 (Ill. App. Ct. 1998), *appeal denied*, 705 N.E.2d 436 (Ill. 1998) (finding that a college and university did not intend for their affiliation to extinguish the college's tenure obligations).

89. *See generally 1966 Statement on Government of Colleges and Universities*, *reprinted in* AAUP POLICY DOCUMENTS & REPORTS, *supra* note 62, at 179-85.

For at least six decades, since the formulation of the landmark 1940 *Statement of Principles*, tenure has served the important end of protecting the academic freedom of faculty members. Tenure bestows an appointment of indefinite duration that can be terminated only for specified reasons and in accordance with codified procedures assigning the principal fact-finding role to the faculty itself. At the same time, however, our cursory exploration of the history of academic tenure in the United States reveals two peculiarities of particular relevance to the discussion of tenure's relationship to compensation in contemporary academic medical centers.

First, the contractual principle of tenure recognizes exceptions when tenure, for legitimate, *bona fide* reasons, becomes financially or programmatically unfeasible. If an institution faces a financial crisis that threatens its existence as a whole and cannot, in the judgment of the governing board, be alleviated through means less drastic than the termination of tenured faculty appointments, or if for programmatic reasons the board determines to discontinue a particular program of instruction, then under those circumstances it is appropriate to terminate the appointments of tenured faculty members.

Second, even though the 1940 *Statement of Principles* contains a passing reference to "economic security" as a second justification for the institution of tenure, it is fair to say that between 1940 and 1996 little deference was given to that phrase by the AAUP, scholars of the history of tenure, or by the courts.[90] If an academic medical center can *terminate tenured faculty appointments* in the event of a financial exigency or the discontinuation of a program or department, thereby reducing the salaries of affected faculty members all the way to zero, it is not too much to suggest that the same event would logically justify less restrictive steps such as reductions in salary. For example, a two-year college in Maryland reacted to massive state and county budget cuts by eliminating academic programs and terminating the appointments of tenured faculty members in those programs.[91] Faculty members argued that the college had no legal right to terminate programs prior to the declaration of an institution-threatening financial exigency.[92] The Maryland Court of Special Appeals disagreed: "The actions taken by the College were designed to avoid the necessity of declaring an 'exigency.' They were, nonetheless, indicative of

90. While some commentators and economists concentrated on the financial underpinnings of the tenure system, *see, e.g.*, Michael S. McPherson & Morton O. Schapiro, *Tenure Issues in Higher Education*, 13 J. ECON. PERSP. 85 (1999), few made any effort to plumb the analytic link between tenure and the "economic security" language in the 1940 *Statement of Principles*. For one elegant exception, see Ann H. Franke, *Tenure and the Faculty Pocketbook*, 81 ACADEME 108 (Mar.-Apr. 1995).

91. *See* Board of Community College Trustees v. Adams, 701 A.2d 1113 (Md. Ct. Spec. App. 1997).

92. *Id.* at 1139-40.

attempts to resolve the present and anticipated financial shortfalls *in order to solve the financial problems without the necessity of taking that last step*."[93]

In sum, the history of academic tenure in the United States sheds little light on the relationship between tenure and compensation. The best that can be said is that tenure does not provide protection against the loss of academic employment due to financial exigency or the discontinuation of academic programs. If contemporary academic medical centers confront financial distress of sufficient acuity to cause multi-million-dollar deficits and at least one bankruptcy filing, to what extent are they justified, as a matter of contract law, in adopting new compensation paradigms for tenured faculty? The AAUP turned its attention to that question only recently.

In early 1996, a subcommittee of the AAUP's Committee A on Academic Freedom and Tenure drafted a thoughtful report entitled *Tenure in the Medical School*.[94] Although this report was published for comment in the January-February, 1996 edition of ACADEME, it was never formally adopted as an expression of official AAUP policy. The report represents the individual views of some of the AAUP's most enlightened and experienced members on the changing meaning of tenure in academic health care centers.

The report is remarkable in several respects. It candidly acknowledges the many ways in which medical schools differ from other university programs, including the emphasis on bottom-line business concerns and the "individual entrepreneurial activities" in which faculty members must engage in order to underwrite portions of their own salaries.[95] Observing that "[t]he situation has become much more complex since the time of the 1940 *Statement of Principles*," the report addresses the sensitive issue of compensation reductions for tenured clinical faculty members.[96] The report suggests "using a basic science salary line as a guidepost for determining salary guarantees for clinical faculty members," and specifically endorses other "[c]reative approaches" to faculty compensation as long as such approaches are "not *overtly* at odds with existing Association policy."[97] While it is a bit unclear what the report means by a "basic science salary line," the report seems to suggest that compensation reductions, even drastic reductions, for tenured clinicians are tolerable so long as the reduced salary is not less than a benchmark pegged in some disciplined fashion to salaries of tenured basic science faculty members.[98]

93. *Id.* at 1140 (emphasis added).
94. *Report: Tenure in the Medical School*, 82 ACADEME 40 (Jan.-Feb. 1996).
95. *Id.* at 42.
96. *Id.* at 43 n.11.
97. *Id.* (emphasis added).
98. *See Report: Tenure in the Medical School, supra* note 94, at 42-44.

IV. LITIGATION INVOLVING COMPENSATION FOR TENURED FACULTY MEMBERS

In litigation involving the construction and interpretation of employment contracts, courts adhere to the so-called "objective law of contracts" under which the parties' contract rights are determined in the first instance by examining the written language in the contract.[99] A faculty member alleging breach of contract bears the initial burden of identifying the contract term that would allegedly be violated if the university reduced his or her salary.

In contrast to some other fields, in which the principal terms of the employment relationship are routinely reduced to an integrated contract of employment, the contract by which faculty members are employed exists in a non-integrated form. As one court indicated: "[I]n construing contracts of employment in a university setting, we follow the instruction that such employment contracts 'comprehend as essential parts of themselves the hiring policies and practices of the University as embodied in its employment regulations and customs.'"[100]

In the relatively few cases in which faculty members have sought to link tenure to compensation, most involve claims by administrators or department chairs that they were entitled to retain their administrator's stipend when they returned to full-time faculty status -- a situation factually and legally distinct from the tenure rights of medical school faculty members whose compensation is reduced for financial reasons.[101]

In the first reported case involving a medical school faculty member's compensation, an academic medical center reduced the salary of a tenured

99. *See, e.g.*, Patel v. Howard Univ., 896 F. Supp. 199 (D.D.C. 1995) (enunciating the general principle that a court "adheres to the 'objective law of contracts,'" whereby the "written language embodying the terms of an agreement will govern the rights and liabilities of the parties . . . ." (quoting Howard Univ. v. Best, 484 A.2d 958, 967 (D.C. 1984))).

100. *Best*, 484 A.2d at 967 (quoting Greene v. Howard Univ., 412 F.2d 1128, 1135 (D.C. Cir. 1969)). *Accord*, Bason v. American Univ., 414 A.2d 522, 525 (D.C. Cir. 1980); Pride v. Howard Univ., 384 A.2d 31, 35 (D.C. Cir. 1978).

101. *See, e.g.*, Franken v. Arizona Bd. of Regents, 714 P.2d 1308 (Ariz. Ct. App. 1985); Barde v. Board of Trustees of Reg'l Community Colleges, 539 A.2d 1000 (Conn. 1988); Tuckman v. Florida State Univ., 530 So.2d 1041 (Fla. Dist. Ct. App. 1988); Kirsner v. University of Miami, 362 So.2d 449 (Fla. Dist. Ct. App. 1978), *cert. denied*, 367 So.2d 1124 (Fla. 1979); Janos v. University of Wash., 851 P.2d 683 (Wash. Ct. App. 1993). *But see* Sorlie v. School Dist. No. 2, 667 P.2d 400 (Mont. 1983); Keiser v. State Bd. of Regents of Higher Educ., 630 P.2d 194 (Mont. 1981). *Sorlie* and *Keiser* arguably stand for the proposition that tenure protects faculty members from reductions in salary. *Franken*, however, distinguished *Keiser* on the ground that it involved the unusual instance of a faculty member who was "tenured as an administrator." The *Franken* court refused to apply *Keiser* when a faculty member was tenured "only as a professor" and held an administrative position "at will" -- which, of course, describes the situation at most institutions. *Franken*, 714 P.2d at 1310. It is fair to describe the *Keiser* holding as an aberration that has commanded little adherence in other courts and other contexts.

faculty member who did not generate as much grant money as expected.[102] The faculty member brought suit on the ground that the salary reduction violated his tenure rights.[103] The court rejected his claim, holding that a university has "a significant interest in having reasonable discretion to administer its educational programs."[104] Moreover, the court continued, "the strength of that interest gives schools leeway in making broad budget decisions that may affect only a few employees."[105]

Klinge v. Ithaca College posed the issue of whether tenure insulated a faculty member from salary reduction.[106] The plaintiff, a tenured full professor at a private college in New York State, was demoted and had his salary reduced. The professor reluctantly accepted his demotion but sued for breach of contract on the ground that, as a tenured faculty member, his salary could not be reduced. The court concluded that the college had the contractual right to reduce a tenured faculty member's salary by stating that "[c]learly, no college is required to perpetuate . . . salaries and benefits each year, simply because the incumbent is tenured . . . ."[107]

In the last two years, several lawsuits and grievances have been filed challenging efforts by academic medical centers to revise compensation policies for tenured faculty members. To date, none of these legal challenges has led to a court decision establishing a link between tenure and protection against salary reduction.

On July 20, 1998, a California trial court rendered a preliminary ruling in *Albrecht v. University of Southern California*.[108] In 1995, the School of Medicine at the University of Southern California ("School"), in an effort to address what administrators referred to as a "structural deficit" in the School,

102. Williams v. Texas Tech Univ. Health Sciences Ctr., 6 F.3d 290 (5th Cir. 1993), *cert. denied*, 510 U.S. 1194 (1994).

103. *Id*. at 292.

104. *Id*. at 293. *See also* Board of Curators v. Horowitz, 435 U.S. 78 (1978); Goss v. Lopez, 419 U.S. 565 (1975); Texas Faculty Ass'n v. University of Tex. at Dallas, 946 F.2d 379 (5th Cir. 1991).

105. *Williams*, 6 F.3d at 293. *See also Texas Faculty Ass'n*, 946 F.2d at 379.

106. Klinge v. Ithaca College, 167 Misc. 2d 458 (N.Y. Sup. Ct. 1995), *aff'd in pertinent part*, 652 N.Y.S.2d 377 (N.Y. App. Div. 1997).

107. *Klinge*, 167 Misc. 2d at 463. *Cf.* UDC Chairs Ch., Am. Ass'n of Univ. Professors v. Board of Trustees of the Univ. of D.C., 56 F.3d 1469 (D.C. Cir. 1995). For many years, the UDC had an unwritten practice of supplementing the salaries of department chairs (all of whom were on nine-month academic contracts) by hiring them for three-month summer appointments. But in the spring of 1992, in response to reduced funding from the Government of the District of Columbia and depletion of its cash reserves, the University announced that department chairs would no longer be employed in the summers. Thirty-three chairs filed suit alleging that they had been deprived of customary summer employment without due process. A unanimous panel of the D.C. Circuit Court of Appeals rejected the chairs' claim that tenure protected them from reductions in annual compensation. 56 F.3d at 1470.

108. No. BC160860 (Cal. Super. Ct. July 20, 1998).

sent a form letter to all tenured members of the basic science faculty. The form letter notified each faculty member that the School intended to implement certain unilateral changes in the standard-form faculty appointment letter, including a shortened employment term (from twelve to nine months), a concomitant reduction of twenty-five percent in each faculty member's annual compensation, reductions in vacation time, the elimination or reduction of other fringe benefits, and the implementation of new "productivity standards" by which to determine compensation in future years.[109] In late 1996, all the tenured basic scientists filed suit for breach of contract. Their lawsuit alleged, among other things, that the School's unilateral implementation of these changes violated their contract rights, including provisions in the faculty handbook that incorporated the "economic security" language in the 1940 *Statement of Principles*.[110]

The court threw out major portions of the lawsuit. The court ruled that "economic security" was too vague to rise to the level of an enforceable contractual obligation:

> A promise is not enforceable unless it is sufficiently definite to allow a court to determine the scope of any duty created by the promise. Promises that are not sufficiently certain to be enforced and which improperly impose on the court the burden of making financial decisions cannot support a breach of contract action. . . . During oral argument, the court inquired of plaintiffs' position as to the meaning of the ["economic security" language in the faculty handbook] and the scope of the duty it allegedly creates. The response involved a vague claim that plaintiffs are entitled to pay parity. . . . [T]he [tenure] contract is unenforceable as a matter of law if interpreted in the manner advanced by plaintiffs.[111]

Just a few days earlier, in *Kirschenbaum v. Northwestern University*, [112] an Illinois trial court rejected the salary claims of a tenured Northwestern University Medical School faculty member. The plaintiff, a tenured clinical psychologist, alleged that his tenure rights were violated by a Medical School salary policy (known as the "zero-based salary policy") that required tenured faculty members to generate sufficient extramural funding from patient revenues or grants to defray one hundred percent of their salaries.[113] The plaintiff argued that, by virtue of the "economic security" provision in the 1940

109. *See id*. *See generally* Alfred G. Kildow, *Medical School Faculty to Prompt a Vigorous USC Defense* (last modified Dec. 5, 1996) <http:www.usc.edu/ext-relations/news_service/chronicle_html> (click on "1996.12.02.html").

110. *See Albrecht*, No. BC160860, slip op. at 1-2.

111. *Id*. at 2, 3.

112. No. 93-CH-8206 (Ill. Cir. Ct. July 17, 1998), *aff'd*, No. 1-98-3059 (Ill. App. Ct. Dec. 29, 1999).

113. The Appellate Court of Illinois provides a detailed history of this case and the relevant contract provisions. *See Kirschenbaum*, No. 1-98-3059, slip op. at 1-18.

Statement of Principles, he was entitled to be paid by the University even in the absence of external funding support.[114] In a caustic decision, the trial judge disagreed: "[T]enure itself, for medical school faculty, as a status, does not as a matter of law require as a necessary incident thereof the payment of an annual salary from university sources."[115] The appellate court affirmed the trial court's decision, finding that the "documents comprising the contract" awarded the plaintiff tenure "for an indefinite period with no financial obligation on Northwestern's part."[116]

Albrecht and *Kirschenbaum* are anomalous factually and are of limited precedential significance; however, the two decisions manifest, at a minimum, some level of judicial hostility to the kinds of objections tenured medical school faculty members are making at many institutions in the face of productivity-based compensation policies.

V. SOME TENTATIVE CONCLUSIONS

We are not far enough into the era of faculty litigation over medical school compensation policies to know for certain whether the reaction of the courts in *Albrecht* and *Kirschenbaum* is a harbinger of judicial resistance to the argument by faculty plaintiffs that medical schools cannot lower the salaries of tenured faculty members to cope with financial hard times. We can nevertheless discern some practical lessons.

First and most important, the link between tenure and academic freedom is venerable and well established; the link between tenure and economic security is more tenuous. Over the last sixty years, the academic-freedom rights of college and university faculty members have been exhaustively plumbed in treatises, court decisions, and AAUP policy statements. Their right to "economic security" is vaguer and more enigmatic. We instinctively

114. *See Kirschenbaum*, No. 93-CH-8206, slip op. at 2.

115. *Id*.

116. *Id*. at 35-36.

The most recent faculty lawsuit was instituted in early 1999 by a group of faculty members from Georgetown University School of Medicine. *See* Glazer v. Georgetown Univ., Civ. A. No. 321-99 (D.C. Super. Ct. filed Jan. 15, 1999). The faculty in *Glazer* challenged the implementation of a productivity-based compensation policy for medical school faculty members. The plaintiffs argued, among other things, that the policy violated their contract rights as tenured faculty members and breached fiduciary obligations owed to the faculty by the President and the Board of Directors. *See id*. In the spring of 1999, the lawsuit was settled. According to an article dated May 28, 1999 in ACADEME TODAY, an online version of the CHRONICLE OF HIGHER EDUCATION, the university agreed to withdraw the compensation policy, supplement the grants of two faculty members who had rededicated grant monies to cover salary shortfalls, and pay the plaintiffs' attorneys' fees. *See Georgetown U. Settles Medical Professors' Lawsuit Over Pay Policy*, ACADEME TODAY <http://www.chronicle.com>. *See also* Andy Amend, *GU Rescinds Med Center Pay Policy*, THE HOYA, Feb. 26, 1999 (visited Jan. 19, 2000) <http://www.thehoya.com/news/022699/news1.htm>.

understand (even in the absence of controlling case law) that economic-security rights would be jeopardized if a college or university ordered either mercilessly large or patently unwarranted salary cuts for tenured faculty members. But as the AAMC's analysis shows, compensation policies adopted in the last few years at many of the nation's academic medical centers are neither extreme nor unwarranted. They guarantee tenured faculty members generous salaries by comparison to academic salaries in the arts and sciences, and they are being implemented by medical schools facing the specter of indisputable, gaping, and in some instances worsening deficits.

As those who have endured it will be the first to attest, tenure litigation produces few winners. It leaves anger, resentment, and financial tribulation in its wake. It represents, in a sense, the failure of what one perceptive observer has called the "social contract" on which the tenure system is bottomed.[117] As financial conditions at the nation's medical schools worsen in the next five years, the leaders of the academic medical community will be under renewed pressure to reduce faculty payrolls. Academic tenure does not pose an insuperable obstacle to the achievement of that goal, but we can learn from the thirty years of experience the courts have had with an allied concept – financial exigency – to discern some common-sense principles to protect against the erosion of tenure.

Just as the AAUP, in its recommended institutional regulation on financial exigency, insists on certain substantive and procedural safeguards to protect the academic freedom of faculty members when financial constraints require the abrogation of tenured faculty appointments, so too can an academic medical center that needs to modify its compensation standards for tenured

117. In Henry Rosovsky's words:

> For me, the essence of academic tenure lies in . . . [the notion of] *tenure as social contract*: an appropriate and essential form of social contract in universities. It is appropriate because the advantages outweigh the disadvantages. It is essential because the absence of tenure would, in the long run, lower the quality of a faculty. And faculty quality is the keystone of university life. The best faculty will attract the ablest students, produce the finest alumni, generate the most research support, and so on . . . .
>
> Our jobs—as senior professors at major universities—require high intelligence, special talents, and initiative. These attributes are in general demand: business, law, medicine, and other professions are looking for people with similar characteristics. And some of these careers promise, at considerable risk, far greater financial rewards . . . .
>
> In my view, tenure carries the implication of joining an extended family; that is the social contract. Each side can seek a divorce: the university only in the most extraordinary circumstances, and the professor as easily as a male under Islamic law. It is not an uneven bargain because the university needs its share of talented people, and professors trade life-long security and familial relations for lesser economic rewards.

HENRY ROSOVSKY, THE UNIVERSITY: AN OWNER'S MANUAL 183-84 (1990).

faculty members incorporate safeguards designed to protect tenure and academic freedom. Among these safeguards would be the following.

The justification for changes in compensation policy should be explained to affected faculty members.

Faculty members, through their elected representatives and governing organizations, should be involved in the formulation of academic policies affecting tenure and compensation.

Compensation standards should be formula-based, to the maximum extent possible, to avoid the appearance that individual compensation determinations are being made for punitive reasons or for reasons that could implicate academic freedom concerns.

In keeping with principles associated with financial exigency, compensation reductions for tenured faculty members should be considered only when other means of staunching operating deficits have been implemented. Faculty compensation reductions should not be the first resort.

"[A] system of tenure, properly applied, is a guarantor of educational quality."[118] As academic medicine confronts the challenges of the next century, the tenure system will be tested as never before. It will endure and be strengthened if faculty appreciate the extraordinary gravity of the financial threats to academic medicine and administrators honor their obligations to explain their actions and heed the voices of responsible faculty leaders.

118. *Report: Tenure in the Medical School*, *supra* note 94, at 45.